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FEDERAL COMMUNICATIONS COMMISSION

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

IN THE MATTER OF
PETITION OF THE CONNECTICUT
DEPARTMENT OF PUBLIC UTILITY
CONTROL TO RETAIN REGULATORY
CONTROL OF THE RATES OF
WHOLESALE CELLULAR SERVICE
PROVIDERS IN THE STATE OF
CONNECTICUT

: PR DOCKET NO. 94-106
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: MARCH 9, 1995

COMMENTS OF THE ATTORNEY GENERAL
OF THE STATE OF CONNECTICUT

Richard Blumenthal, Attorney General of the State of Connecticut ("AG") hereby files his additional comments in support of the Connecticut Department of Public Utility Control's ("DPUC") Petition to Retain Regulatory Authority and Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut ("Petition"), filed with the Federal Communications Commission ("FCC") on August 9, 1994.

I. INTRODUCTION

The AG has previously filed Comments dated September 19, 1994, and Reply Comments dated October 18, 1994 with the Federal Communications Commission ("FCC" or "Commission") in this docket, which support granting of the DPUC's Petition by this Commission. Our position remains unchanged. Since our Brief dated June 29, 1994, which was filed in DPUC Docket No. 94-03-27 and is part of the record before the FCC, provides a comprehensive analysis in support of our position, including reference to protected information, we refer the Commission to it for further justification for granting the DPUC's Petition.

As a result of recent actions by the Wireless Telecommunications Bureau ("Bureau") within the FCC regarding the designation of certain materials submitted by the DPUC as "confidential,"^{1/} the record which the FCC now has before it is

1/ On January 25, 1995, the Bureau issued an Order ("First Confidentiality Order") regarding the designation of certain material from the DPUC's proceeding in Docket No. 94-03-27 as "confidential." Subsequently, on February 9, 1995 the Bureau issued a second Order ("Second Confidentiality Order") regarding the confidential treatment of some material submitted by the DPUC, and the exclusion of other material from the record in this matter. On February 24, 1994, the Bureau issued another Order, which reconsidered

(footnote cont'd)

essentially the same as the administrative record on which the DPUC relied in issuing both its Decision dated August 8, 1994 in Docket No. 94-03-27 ("Decision"), Connecticut DPUC Investigation Into The Connecticut Cellular Service Market and the Status of Competition, and the August 9, 1994 Petition pending before this Commission.

Based on all of the evidence presented, including both public and confidential information subject to the terms of a Protective Order, we urge the FCC to find that the DPUC's Petition satisfies the statutory criteria in 47 U.S.C. § 332(c)(3)(A)^{2/} for a state to retain regulatory authority over wholesale cellular providers. The DPUC's Petition and supporting Decision, which were the result of an extensive review during a formal administrative proceeding, correctly analyzed and culled evidence which the FCC indicated in its Second Report and Order, In the Matter of Implementation of Sections 3(a) and 332 of the

(footnote cont'd from previous page)

the Second Confidentiality Order, and provided that materials previously excluded from the record would now be included.

- 2/ A petition to the FCC to retain regulatory authority over wholesale cellular providers must show that "market conditions with respect to such service fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."

Communications Act, Regulatory Treatment of Mobile Services, FCC 94-31, Gen. Docket No. 93-252, would be considered "pertinent" in examining "market conditions and consumer protection." And although some may dismiss the DPUC's chosen method of gathering and presenting its evidence, i.e. undertaking an extensive administrative hearing and presenting its findings and the record here, this Commission in the Second Report and Order, ¶252, however, recognized that "a state should have discretion to submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state."

Since the DPUC's Petition clearly presents evidence that meets the FCC and statutory criteria necessary for state regulation of wholesale cellular providers, as we have previously stated, the Commission should grant it.

II. ARGUMENT

A. The DPUC Has Provided Sufficient Evidence Of Lack Of Competition In The Connecticut Wholesale Cellular Market.

As we have pointed out in our prior filings with the Commission in this matter, the Connecticut wholesale cellular market lacks effective competition. As a result, market conditions have not and do not protect consumers in this state from unreasonable prices. Contrary to claims made by opponents of the DPUC's Petition, there are no present substitutes for cellular service in Connecticut,^{3/} and no substitutes appear to be immediately on the horizon.

Moreover, despite the claims of the carriers, they presented no evidence whatsoever that there are any cross elasticities of demand between claimed substitute services and cellular service.

In addition, the DPUC properly concluded, based on record evidence, that the Connecticut wholesale cellular market is not

3/ The DPUC correctly found (as the carriers admitted below regard to two way voice transmissions) that paging services are not a substitute for cellular service. As for SMR services, i.e. dispatch, this does not allow the user to communicate with all other persons in a service area, and also, may not provide interconnected service. See Decision, at 17 and AG Brief dated June 29, 1994 in DPUC Docket No. 94-03-27 at 6-7.

effectively competitive. For example, as we have previously pointed out (See AG Reply Comments dated October 18, 1994, at 11-12), the Connecticut wholesale cellular carriers have maintained relatively constant prices, which are further indication of lack of effective competition. Indeed, the record confirms that monthly access charges and per minute usage charges of the two Connecticut wholesale carriers have changed only during or at approximately the same time as proceedings were initiated before the DPUC. In a truly competitive market, price changes would be triggered by other factors, such as operating efficiencies, and not by regulatory proceedings. Moreover, price changes resulting from truly effective competition would benefit all resellers, and not just the retail affiliates of the wholesale carriers, as has been the case in Connecticut.

Of particular significance is the consensus by Connecticut's wholesale carriers that with more competitors, wholesale cellular rates could be reduced by 25 to 33 percent. See AG Brief dated June 29, 1994 in DPUC Docket No. 94-03-27, at 13 and citations therein. According to the carriers' own witnesses, prices do not come down as quickly now as they would if there were more competitors in Connecticut's wholesale cellular market. Thus, under the status quo, rates are higher than they otherwise would

be with more competitors. This is tantamount to admitting that whatever minimal level of competition now exists between wholesale carriers, it has not been effective in forcing prices down to their lowest, effectively competitive level.

Aside from lack of effective price competition, the DPUC properly relied on other indicia of unjust and unreasonable rates in concluding that the Connecticut wholesale cellular market lacks effective competition. The record reflects that the wholesale carriers' relationship with their affiliated resellers has resulted in anti-competitive and coercive practices which are targeted against non-affiliated resellers. End use consumers are also harmed by such practices, which only benefit the affiliated resellers to the detriment of all others.

CONFIDENTIAL

END OF CONFIDENTIAL

B. The FCC Should Grant The DPUC's Petition Which Is Based On Conclusions And Supporting Evidence From Its Investigation In Docket No. 94-03-27.

The DPUC investigative proceeding in Docket No. 94-03-27 was conducted in accordance with the provisions of the Connecticut Uniform Administrative Procedure Act applicable to "contested

cases." See Conn. Gen. Stat. § 4-176e et seq. Accordingly, the DPUC investigation in Docket No. 94-03-27 involved: the issuance of interrogatories; the filing of responses to interrogatories; expert witness testimony on behalf of both wholesale cellular providers and independent resellers; extensive cross examination, rebuttal testimony; the filing of briefs, reply briefs, and written exceptions to the DPUC's draft decision; and oral argument.

In response to the conflicting testimony presented in DPUC Docket No. 94-03-27, the DPUC weighed the evidence before it and concluded that "the current [wholesale cellular] market conditions [in Connecticut] sustain anti-competitive and discriminatory practices on the part of the wholesale CMRS providers." (See Petition, at 2.) This conclusion was reached only after the DPUC considered all of the record evidence, including the credibility of witnesses.

In reviewing the DPUC's Petition, without the benefit of live in person testimony, the Commission should accord some deference to the findings of the DPUC. Connecticut took its task seriously and the DPUC used the opportunity to examine its cellular market thoroughly. As long as there is supporting evidence for the DPUC's conclusions, then these conclusions

should be accepted by the Commission, and the Petition granted. We urge the Commission to reject the request of some parties to in essence afford no comity to the State of Connecticut.

Thus, we recommend that the Commission, like a reviewing court in an appeal from an administrative decision pursuant to 5 U.S.C. § 706, give deference to the DPUC's findings on fully litigated issues concerning the criteria for retaining regulatory control over wholesale cellular providers in the Connecticut market. If the standard for reviewing an administrative decision is applied, the DPUC's conclusions should be upheld "if they are supported by (such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" [citations omitted] See State of N.Y. v. Reilly, 969 F.2d 1147, 1150 (D.C. Cir. 1992.) Although evidence may support alternative conclusions, a reviewing court "will sustain the agency 'if a reasonable person could come to either conclusion on that evidence.'" Id. at 1150.

As long as there is an adequate evidentiary basis for the Petition, which we strongly believe there is, this Commission should grant the Petition. This recommended action is consistent with both 47 U.S.C. § 332(c)(3)(A) and the Second Report and Order.


III. CONCLUSION

For all of the foregoing reasons, the DPUC's Petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to all parties who have filed comments in this proceeding.


VALERIE J. BRYAN
Assistant Attorney General

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